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8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

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11 UNITED STATES OF AMERICA, )  
12 Plaintiff, ) No. CR 09-70265 MMC (BZ)  
13 v. )  
14 JUSTIN SMITH, ) ORDER SETTING RELEASE  
15 Defendant. ) CONDITIONS

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17 The government's motion to detain the defendant Justin  
18 Smith came before this court on April 3, 2009. The defendant  
19 was present in custody and represented by Deputy Public  
20 Defender Geoffrey Hansen. Assistant United States Attorney  
21 Katherine Dowling represented the government. Both sides had  
22 an opportunity before the hearing to review a report prepared  
23 by Pretrial Services, which recommends detention.

24 After considering the evidence proffered and the  
25 parties' arguments, I find that while defendant presents a  
26 risk of flight and a danger to the community, in as much as  
27 defendant is willing to return to State custody, there are  
28 conditions of release which will ameliorate these risks. In

1 so concluding I considered the following:

2       1. Defendant is charged with violating 18 U.S.C. §  
3 922(g)(1), being a felon in possession of a firearm. He faces  
4 a possible sentence of 10 years' imprisonment, thereby giving  
5 him an incentive to flee.

6       2. Defendant's ties to the community are not strong. He  
7 had been living in Oregon with his wife, and he would not  
8 disclose her current residence. His principal tie to  
9 California is his 86 year old grandmother, who is unsure if  
10 she is willing to serve as a surety.

11       3. Defendant does not have a stable employment history.  
12 After working for the family business for some years, he has  
13 only been employed for a total of 3 weeks since 2006.

14       4. Defendant was diagnosed with Bi-polar Disorder and  
15 Schizophrenia while in custody in 2007. Although defendant is  
16 currently taking medication, he admits to hearing voices from  
17 time to time, and denies receiving mental health counseling.  
18 This raises questions about his reliability.

19       5. Defendant's criminal history involves violent  
20 behavior. In 2007, defendant was convicted of two felonies  
21 for elder abuse against his grandmother, and for evading a  
22 peace officer in a high-speed chase. He is charged with  
23 possession of a large number of weapons. At the time of his  
24 arrest for the federal charges, defendant was being held in  
25 State custody without bail. He proffered that he had been  
26 sentenced to 1 year in state prison for a parole violation and  
27 there is a detainer lodged against him.

28       6. The foregoing factors are sufficient to persuade me

1 by a preponderance of the evidence that defendant is a risk of  
2 flight, and by clear and convincing evidence that he is a  
3 danger to the community. However, because defendant wishes to  
4 be released to the state authorities so he can serve his  
5 sentence I am satisfied that there are conditions of release  
6 which would reasonably ameliorate these risks. If defendant  
7 is in State prison, he cannot pose a flight risk or a danger  
8 to the community.

9         Based on the foregoing, the Government's motion for  
10 detention is **DENIED**. **IT IS HEREBY ORDERED** that:

11             1. The United States Marshall will release  
12 defendant into State custody if the State seek to reacquire  
13 physical custody of defendant within 10 days of this order.

14             2. The United States Marshall shall inform the  
15 government and defense counsel if the State seeks custody.

16             3. If the State does not take custody of defendant  
17 within 10 days of this order, the United States Marshall will  
18 retain custody of defendant and bring him before this Court on  
19 **Monday, April 13, 2009 at 9:30 a.m.** for further proceedings.

20 Dated: April 3, 2009

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22                     Bernard Zimmerman  
23                     United States Magistrate Judge

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